

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

RICHARD ESTRELLO

Appellant,

v.

ROBERT A. MCDONALD
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet. App. No. 15-2885

**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the July 17, 2015, decision of the Board of Veterans' Appeals (Board) should be affirmed to the extent that it denied entitlement to service connection for a lumbar spine disorder associated with lower extremity radiculopathy.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252.

B. Nature of the Case

Appellant, Richard Estrello, appeals the July 17, 2015, Board decision that denied entitlement to service connection for a lumbar spine disorder associated with lower extremity radiculopathy. Record Before the Agency (RBA) at 1-28.

C. Statement of Facts

The facts relevant to the issues raised on appeal are not in dispute. Appellant served on active duty from June 1976 to August 1976. RBA at 20. In July 1996, he complained of back pain after an obstacle course; he reported that he had back surgery three years earlier before he entered service. RBA at 20. He was subsequently separated from service due to his back disability. *Id.*

In or around June 1993, Appellant was involved in a motor vehicle accident. *Id.* He reported severe low back pain as a result of the accident. *Id.* Almost a decade later – approximately 28 years after he separated from service – Appellant filed a claim for Department of Veterans Affairs (VA) disability compensation benefits, ultimately attributing his back disability to an obstacle course injury.

Included in the record is a December 2008 private medical opinion by Dr. Julio Olivieri. RBA at 1590. In it, Dr. Olivieri stated that it had come to his attention after a careful review of the medical records that Appellant had a history of bilateral spondylolysis and spondylolisthesis, that Appellant alleged that he had informed the military examiner of his condition, and that he alleged that he sustained a lower back injury during basic training which caused him to be

medically discharged from service. *Id.* Dr. Olivieri concluded that the injury Appellant sustained in service was “only partially caused by his previous back conditions and the trauma sustained during this event has caused progressive worsening of his condition.” *Id.* The examiner did not provide any further rationale for his opinion. *Id.*

During the pendency of his claim, Appellant underwent VA medical examinations in November 2009, RBA at 1183-84, April 2011, RBA at 1316-18, May 2012, RBA at 1282-1305, and November 2013, RBA at 164-76. A medical opinion was also obtained in October 2012. RBA at 625-26.

In relevant part, the November 2013 examiner reviewed Appellant’s medical history and noted, *inter alia*, that Appellant underwent a surgical procedure in May 1973, and did fairly well after that until military service triggered his original symptoms; he emphasized, however, that there was no further clinical documentation of any lower back or lower extremity issues until late 1993 when Appellant had a recurrence of low back and lower extremity problems as a result of a motor vehicle accident. RBA at 174 (164-76). Based on his review of the medical evidence and clinical examination, the examiner concluded that Appellant’s low back and lower extremity problems “definitely preceded service” and “were not permanently aggravated by his one month of military service at all,” *Id.* at 175.

The examiner noted that Appellant served in the military for only one month and that, afterwards, he worked as a printer for many years until he was

involved in a motor vehicle accident in June 1993 when his lower back flared up and he required surgical intervention. *Id.* The examiner re-emphasized that there were no medical records at all for the period between August 1976 and November 1993 and opined that, in light of the absence of any documented problems for that seventeen year period, “one would have to assume that the Veteran was doing well during that period of time.” *Id.* The examiner added that Appellant’s current clinical findings were consistent with his past surgical history prior to service as well as the natural aging of the spine over the forty years since the initial surgery. *Id.*

In May 2014, the Board remanded Appellant’s claim and instructed, *inter alia*, that clarification be obtained from the November 2013 medical examiner as to whether Appellant’s preexisting low back disability clearly and unmistakably was not aggravated beyond the normal progression of the disease by his military service. RBA at 300 (294-302). The Board also advised that insofar as Appellant is competent to report his symptoms and history of continuous symptomatology, such reports should be acknowledged and, if rejected, a reason for the rejection must be provided. *Id.*

The examiner submitted his addendum in June 2014. The examiner reiterated much of what he had stated in his November 2013 report and reaffirmed “all of my previous statements.” RBA at 108 (107-09). The examiner noted that Appellant had lifelong back and lower extremity problems for which he had surgery in 1973 and that his activities in boot camp worsened his back

symptoms during that period. *Id.* However, the examiner emphasized that it was “a mere three week period” and that there was “no documentation that this brief three week period permanently aggravated the Veteran’s lower back, because there is no documented follow-up until 1993.” *Id.*

The examiner concluded:

Once again, there is no medical documentation of ongoing lower back problems available for my review until the accident in 1993, which is 17 years after boot camp. Your statement that the absence of treatment for the asserted disability in the Veteran’s file cannot serve as the basis for a negative opinion is not medically acceptable to me. I would have to resort to mere speculation to state that the Veteran had ongoing back problems that were permanently aggravated by three weeks of boot camp in 1976. The Veteran clearly admitted that he worked full time from 1976 until his accident in 1993; this in and of itself provides some degree of proof that his lower back was stable enough to allow him to be fully employed for 17 years. It is my medical opinion, therefore, and I firmly assert once again that the boot camp in 1976 caused only a temporary aggravation in the Veteran’s lower back disability.

Id. at 108-09.

In its decision, the Board found clear and unmistakable evidence that Appellant’s back condition preexisted his brief period of military service (which is not disputed) and that it was not aggravated by service, and explained in detail the basis of both conclusions. RBA at 12-13. The Board also acknowledged the December 2008 opinion by Dr. Olivieri but found that it was of diminished probative value for several reasons, to include the fact that Dr. Olivieri did not identify any of the medical records he reviewed, did not indicate that he reviewed the service treatment records, did not provide any rationale for his opinion, and

did not acknowledge the significance of the injuries Appellant sustained as a result of his 1993 motor vehicle accident. RBA at 18.

III. SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate prejudicial error in the Board decision. As such, the Court must affirm the July 17, 2015, Board decision that denied entitlement to service connection for a lumbar spine disorder associated with lower extremity radiculopathy.

IV. ARGUMENT

Appellant raises two arguments on appeal. He contends that the November 2013 examination report and June 2014 addendum opinion were inadequate and that the Board improperly discounted the December 2008 private medical opinion. (App. Br. at 5-11). Neither argument establishes error in the Board decision.

A. Appellant fails to show that the November 2013 examination report and June 2014 addendum opinion were prejudicially inadequate.

Appellant contends that the November 2013 examination report is inadequate because the examiner “completely downgrades” his “numerous statements” of “continual and increased pain since service” and that the June 2014 addendum did not cure this deficiency because the examiner merely reaffirmed his previous statements and again made no mention of his statements of continuous symptomatology. (App. Br. at 6-8). There is a critical flaw in this argument: it is ultimately irrelevant whether the examiner commented on the statements of continuous symptomatology because the Board found that those

statements were not credible. RBA at 11. Appellant does not challenge the Board's credibility determination and, as such, his argument at most amounts to an allegation of harmless error.¹ See *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error).

B. Appellant fails to show that the Board improperly discounted the probative value of the December 2008 private medical opinion.

While Appellant does not directly state what legal error he believes that the Board committed in connection with its decision to discount the probative value of the December 2008 private opinion, he seems to suggest that the Board improperly relied on the fact that Dr. Olivieri did not identify any of the medical records he reviewed or acknowledge his 1993 motor vehicle accident. (App. Br.

¹ This is not to say that the Secretary otherwise agrees with the substance of Appellant's argument. He does not. In his initial report, the examiner noted that Appellant served in the military only very briefly and that, afterwards, he worked as a printer for many years until he was involved in a motor vehicle accident in June 1993 which caused a flare-up of his lower back problems and ultimately required surgical intervention. *Id.* The examiner re-emphasized that there were no medical records at all for the period between August 1976 and November 1993 and opined that, in light of the absence of any documented problems for that seventeen year period, "one would have to assume that the Veteran was doing well during that period of time." RBA at 175 (164-76). In his addendum, the examiner reiterated that there was no medical documentation of ongoing lower back problems available for his review until the 1993 accident which was seventeen years after Appellant allegedly injured himself in service. RBA at 108. The examiner explained that, in order to find that Appellant's ongoing back problems were permanently aggravated by his three weeks of boot camp in 1976 without actual medical records, he would have to resort to mere speculation. To be sure, the examiner added that insofar as Appellant worked full time from 1976 until his accident in 1993, that this in and of itself proved to some degree that his lower back was stable enough to allow him to be fully employed for seventeen years. To the extent that the examiner found the lack of treatment records and documented complaints of back problems for a seventeen year period, right up until Appellant was involved in severe motor vehicle accident where he injured his back, was medically persuasive evidence that Appellant's back problems were not permanently aggravated by his mere three weeks in basic training, this is a fully acceptable and adequate rationale. Insofar as Appellant believes that the examiner should have been able to render a more favorable opinion based solely on his reported complaints of back problems, he has no medical basis to make such an assertion.

at 10-11). There is no merit to this argument.

First, as stated above, the Board discounted the probative weight of the opinion for multiple reasons, to include the opinion was provided without any rationale. RBA at 11. Appellant does not dispute that Dr. Olivieri did not provide a rationale to support his opinion. That fact alone provided the Board with sufficient grounds to reject the opinion. See *Stefl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007) (holding that the Board may not rely on a medical examiner's conclusory statements if they lack supporting analysis). Second, to the extent that Appellant takes issue with the fact that the Board found it relevant to assessing the probative weight of the opinion that Dr. Olivieri did not identify any of the medical records he reviewed, he does not explain why this was legally improper or factually erroneous given, especially, that, as the Board noted, there was reason to question what Dr. Olivieri reviewed because had he looked through the service treatment records, he would have known that Appellant had not informed the military of his back disorder at the time of his entrance examination. RBA at 11. As to Appellant's objection that the Board found it relevant that Dr. Olivieri did not so much as mention his 1993 motor vehicle accident, he provides no legal basis for finding that this was improper. Appellant has a current back injury; he was involved in a serious motor vehicle accident that resulted in back problems and surgical intervention; it was entirely appropriate for the Board to question the persuasiveness of Dr. Olivieri's opinion given that Dr. Olivieri did not even mention the 1993 accident. To the extent that

Appellant suggests that, if the Board wanted to know more about the basis of Dr. Olivieri's opinion, it should have contacted him for more information, the Board was under no obligation to do so. Indeed, multiple subsequent medical opinions were obtained, none of which found that Appellant's preexisting back condition was permanently aggravated by service. See RBA at 1183-84; RBA at 1316-18; RBA at 1282-1305; RBA at 625-26; RBA at 164-76.

Ultimately, the Board has wide latitude to assess and determine the probative weight of the evidence, *D'Aires v. Peake*, 22 Vet.App. 97, 107 (2008), and Appellant fails to show that the Board clearly erred in its assessment of and assignment of probative weight to the evidence. As such, Appellant's argument amounts to nothing more than a mere disagreement with the Board's evaluation of the evidence, and does not establish prejudicial error in the Board decision.

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the July 17, 2015, Board decision that it denied entitlement to service connection for a lumbar spine disorder associated with lower extremity radiculopathy.

Respectfully submitted,

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